

AGREEMENT NUMBER

REGISTRATION NUMBER

3680

PROJECT CODE XXX

1. This Agreement is entered into between the State Agency and the Contractor named below:

STATE AGENCY'S NAME

DEPARTMENT OF BOATING AND WATERWAYS (DEPARTMENT)

CONTRACTOR'S NAME

NAME (BORROWER)

2. The term of this

Agreement is: DATE (effective date) through (until repaid in full)

3. The maximum amount
of this Agreement is:

\$ XXX,000.00
XXX THOUSAND DOLLARS

4. The parties agree to comply with the terms and conditions of the following exhibits, which are by this reference, made a part of the Agreement.

(PROJECT NAME)

Exhibit A –Small Craft Harbor Construction Loan and Operation Agreement

19 pages

Exhibit B – (NAME) Feasibility Report

6 pages

Exhibit C – Department of Boating and Waterways Marina Maintenance Standards and Guidelines

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto.

CONTRACTOR

CONTRACTOR'S NAME (if other than an individual, state whether a corporation, partnership, etc.)

NAME

BY (Authorized Signature)



DATE SIGNED(Do not type)

PRINTED NAME AND TITLE OF PERSON SIGNING

ADDRESS

STATE OF CALIFORNIA

AGENCY NAME

DEPARTMENT OF BOATING AND WATERWAYS

BY (Authorized Signature)



DATE SIGNED(Do not type)

PRINTED NAME AND TITLE OF PERSON SIGNING

RAYNOR TSUNEYOSHI, Director

ADDRESS

2000 EVERGREEN STREET, SUITE 100
SACRAMENTO, CALIFORNIA 95815-3888

*California Department of General
Services Use Only*

☐ Exempt per:

**SMALL CRAFT HARBOR
CONSTRUCTION LOAN AND OPERATION AGREEMENT**

Sample

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**SMALL CRAFT HARBOR
CONSTRUCTION LOAN AND OPERATION AGREEMENT**

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ARTICLE 1 – PROMISE TO PAY

- A) For value received, the Borrower promises to repay the sum of principal disbursed pursuant to this Agreement together with interest on that amount at the rate set forth below until fully repaid.

ARTICLE 2 - DEFINITIONS

- A) “Account”: An interest bearing account to be established by the Borrower for the deposit of Loan funds; such account is to be designated the *Cal Boating Loan - Marina Development Account* (see Article 5 – Disbursement of Loan).
- B) “Borrower”: The Borrower described in Exhibit B (Feasibility Report).
- C) “CEQA”: The California Environmental Quality Act.
- D) “Collateral”: Property, both real and personal, whether tangible or not, pledged as security for repayment of the Loan.
- E) “Commission”: The Boating and Waterways Commission.
- F) “Date of Acceptance of the Project”: The date specified on the Project Completion Certification.
- G) “Default”:
 - 1) The failure of the Borrower to make any payment required by this Agreement within Thirty (30) days of the due date of the payment.
 - 2) The failure of the Borrower to comply with any other requirement of this Agreement within One Hundred Eighty (180) days of receipt of written notice from the Department specifying such failure.
 - 3) The provision of false representations or false warranties by the Borrower in response to any obligations under this Agreement.
 - 4) The failure of Borrower to conduct appropriate proceedings in good faith to contest any levy or proceeding against the Collateral or Borrower's interest therein; or
 - 5) The filing of a petition by the Borrower under the provisions of the Bankruptcy Code, or the failure of the Borrower to conduct appropriate proceedings in good faith to contest a bankruptcy filing by a third party when such action affects the collateral.
- H) “Department”: The Department of Boating and Waterways.
- I) “Gross Revenues”: The inflows of revenues, before expenses are subtracted, received by the Borrower for services, facilities and leaseholds provided or located within the Project Area, described in TABLE 1 of Exhibit B.
- J) “Loan”: The Loan described in Exhibit B.

- K) "Project": The construction, improvement, acquisition, or maintenance of small craft harbors, related facilities, or connecting waterways described in Exhibit B.
- L) "Project Area": The real property, and improvements thereto, identified in Exhibit B, within which the Project will be undertaken.
- M) "Project Completion Certification": A fully executed Notice of Completion, or equivalent, which states the Borrower has accepted the Project as complete on a specific date.
- N) "Project Costs": Contract, equipment, labor, material and construction costs that are incurred by the Borrower for the purpose of completing the Project. Project costs incurred:
 - 1. For indirect or overhead charges may be reimbursed up to the combined maximum budget allocation for *Engineering, Inspection* and *Permits* Cost as described in Exhibit B (Feasibility Report – Cost Estimate Table), and
 - 2. Shall not include any expenses prior to the effective date of this Agreement.
- O) "Reserve Fund": A separate and independent fund for the exclusive purpose of providing extraordinary, non-routine maintenance, repair or replacement during the term of this Agreement.
- P) "Surplus Revenues": Gross Revenues less the Borrower's expenses for (1) Loan repayment, and (2) operation and maintenance (including the Reserve Fund) of the project.
- Q) "Unpaid Balance": Total outstanding debt, including principal and accumulated interest.

ARTICLE 3 – BORROWER COVENANTS

- A) The Borrower certifies that the obligation created by this Agreement will not create an indebtedness or liability contrary to the provisions of Section 18 of Article XVI of the Constitution of the State of California.
- B) The Borrower certifies that the Borrower has title to, or adequate interests in, the Project Area. Adequate interests include, but are not limited to, the following:
 - 1) Access to the Project Area by a maintained public way,
 - 2) A right of passage over a waterway, open to the public, between the Project Area and navigable waters, and
 - 3) Easements or other rights of way outside the Project Area sufficient to provide utilities and services to the Project.

- C) The Borrower agrees to incur no additional indebtedness having greater priority than the Loan in payment of principal or interest or pledge of revenues involving the Project Area without first obtaining the written consent of the Department.
- D) The Borrower warrants that there is no encumbrance, lien, easement, license, title, cloud or other interest that may interfere with the Project Area or use thereof by the public.

ARTICLE 4 - TERM OF AGREEMENT

- A) This Agreement shall remain in full force and effect until the Borrower repays the Loan and all accumulated interest in full, or this Agreement is otherwise terminated.
- B) This Agreement may be extended, amended or cancelled upon the written agreement of the parties.

ARTICLE 5 - DISBURSEMENT OF LOAN

- A) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates to the satisfaction of the Department that the Borrower has title to, or adequate interests in, the real property comprising the Project Area.
- B) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates that it has all acquired permits necessary to construct and operate the Project.
- C) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower demonstrates that it has satisfactorily complied with CEQA for the Project.
- D) The Department shall have no obligation to disburse any of the Loan unless and until the Borrower has fully executed all required security agreements; such security agreements are recorded if necessary; and original or conformed copies of such recorded documents are received by the Department.
- E) Loan disbursements may be made either (1) in advance of Project work or (2) after the occurrence of work (in arrears).
 - 1) Loan disbursements in advance of Project work shall be subject to the following conditions:
 - (a) The Borrower may request a Loan advance from the Department to cover those Project Costs expected to occur in the succeeding Thirty (30) day period.
 - (b) Requests for Loan disbursements may not be made more than once every Ninety (90) days.
 - (c) All disbursed Loan funds shall be deposited in the Account, which shall reflect all receipts and expenditures of Loan funds.

- (d) The Borrower must request Loan disbursement in writing. Invoices or other evidence of Project Costs must accompany requests.
- (e) The Department shall withhold from Loan disbursements an amount equal to Ten Percent (10%) of each disbursement until the Department has accepted the Project as complete, approved all Project Costs, and all mechanic's liens have been released. The Borrower shall provide the following to the Department:
 - (i) A Project Completion Certificate (or equivalent)
 - (ii) An accounting of all Loan funds
- (f) All Loan funds disbursed by the Department to the Borrower shall remain under the control of the Department until the Department approves such funds for expenditure.
- (g) The Borrower shall request Department approval of the final expenditure of disbursed Loan funds no later than Thirty (30) days following the Department's acceptance of the Project as completed.
- (h) The Borrower shall return to the Department any Loan funds including interest remaining in the Account after all Project Costs have been paid. Such Loan funds shall be:
 - (i) Returned to the Department no later than Sixty (60) days following date of acceptance of the Project by the Borrower, and
 - (ii) Applied to the reduction of the Loan.
- 2) Loan disbursements made in arrears shall be made as follows:
 - (a) The Borrower may request a Loan payment in arrears not more than once every Thirty (30) days; such requests must be accompanied by paid invoices or other evidence of Borrower's payment of Project Costs.
 - (b) The Borrower shall record such disbursements in the Account.
 - (c) The Department shall withhold from Loan disbursements an amount equal to Ten Percent (10%) of each disbursement until the Department has accepted the Project as complete, approved all Project Costs, and all mechanic's liens have been released. The Borrower shall provide the following to the Department:
 - (i) A Project Completion Certificate (or equivalent)
 - (ii) An accounting of all Loan funds.
- F) The Department may withhold any Loan disbursement if the Borrower fails to comply with any of the provisions of this Agreement.

ARTICLE 6 - CONSTRUCTION OF PROJECT

- A) The Borrower shall complete the Project no later than Five (5) years following the effective date of this Agreement.
- B) The Borrower shall, within Sixty (60) days of approval of this Agreement, provide the Department with a project schedule showing the proposed dates (beginning and ending dates) of the following Project phases or milestones: Borrower selection of the Project design consultant; Department approval of the consultant contract; Project design process; submission of final plans and specifications to the Department for approval; advertising for construction bids; Project bid-opening date; submission of construction contract to Department for approval; Project construction; acceptance of Project by the Borrower; and, submission of a Project Completion Certificate to the Department.
- C) The Borrower shall obtain from the Department advance written approval of the following:
 - 1) All bid documents prior to advertisement,
 - 2) All construction contracts prior to award, and
 - 3) All construction change orders that increase or decrease the construction contract amount by \$5,000 or more.
- D) All architectural engineering contracts for plans and specifications shall require that the plans and specification:
 - 1) Be prepared by persons licensed by the State of California to undertake the type of design required by the Project (engineer's/architect's certificate number to appear on construction contract design documents),
 - 2) Be submitted to the Department and Borrower on CD or DVD; all drawings shall be in one of the following electronic file extensions: .DWG or .DXF, and specifications shall be submitted in MS Word or WordPerfect format,
 - 3) Become the property of the Borrower,
 - 4) Provide for all Project facilities set forth in Exhibit B, and
 - 5) Provide for shoreside facilities for removing waste from vessel holding tanks in accordance with the Harbors and Navigation Code section 654.1 and Title 14, California Code of Regulations, section 5200.
- E) All construction contracts of the Project shall:
 - 1) Be awarded in accordance with all applicable laws and regulations,
 - 2) Contain the following clause: "Representatives of the Department of Boating and Waterways shall be allowed access to all parts of the construction work.",

- 3) Contain a clause stating that the Contractor and its subcontractors shall not unlawfully discriminate, harass, or allow harassment against any employee who is employed in the work covered by such contracts or against any applicant for such employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS), mental disability, medical condition (cancer), age, marital status, and denial of family care leave, and that such provisions shall include, but not be limited to: employment, upgrading, promotion or transfer, recruitment, or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship,
 - 4) Contain a clause that the contractor shall comply with all air pollution and environmental control rules, regulation, ordinances and statutes which apply to the Project and any work performed pursuant to the construction agreement, and
 - 5) Contain a clause that requires the contractors to certify the structural integrity and safety of the Project.
- F) Prior to the commencement of the construction of the Project, the Borrower shall cause the contractor and a corporate surety acceptable to the Department to furnish in favor of the Borrower and the Department, as their interests may appear, bonds or other security interests as allowed pursuant to Public Contract Code sections 10263 and 22300 in the minimum amounts indicated below:
- 1) Faithful performance - One Hundred Percent (100%) of the total construction agreement bid price.
 - 2) Labor and materials - One Hundred Percent (100%) of the total construction agreement bid price.
- G) The Borrower's personnel and construction of the Project shall be under the supervision of qualified inspectors. Inspection reports and related inspection data shall at all reasonable times be accessible to the Department personnel, and on request copies of such reports and data shall be provided to the Department by the Borrower.
- H) If for any reason whatsoever the Borrower does not complete the Project by the date in Paragraph A above, then all Loan funds disbursed to the Borrower prior to such date plus any accumulated interest shall become, to the extent permitted by law, a general obligation of the Borrower and shall be due and payable One Hundred Eighty (180) days after the close of the fiscal year.

ARTICLE 7 - LOAN REPAYMENT

- A) Repayment of the Loan shall begin on August 1 immediately following the first Loan disbursement as follows:
- 1) Interest only payments shall be made beginning on August 1 immediately following the first Loan draw and be made annually until drawdown is completed. However, upon written agreement between Department and Borrower, Borrower may forego interest-only payments.
 - 2) Repayment of principal and interest shall begin on August 1 immediately following the final draw and be made in Thirty (30) annual, approximately equal payments. However upon written agreement between Department and Borrower, repayment of principal and interest may begin on the succeeding August 1.
 - 3) All payments are due on August 1 of each year, and late if not received by the Department by August 15 of each year.
- B) Interest shall be compounded continuously at the rate of Four and Five-Tenths Percent (4.5%) per annum on the Unpaid Balance. Interest compounds on the Unpaid Balance of the Loan commencing with the warrant date of each disbursement of Loan funds by the Department.
- C) Repayment of the Loan shall be made from Project Area Gross Revenues. However, to the extent that the revenues generated within the Project Area are insufficient to repay the Loan, the Borrower shall assign and collect other revenues, and/or as lawfully authorized, levy and collect taxes as necessary to pay each Loan payment.
- D) The Department will provide a repayment schedule to Borrower and may make adjustments in the schedule of annual Loan payments to reflect changes of principal or interest such as prepayments that have been made.
- E) The Borrower at its option may at any time make prepayment of all or part of the principal on the Unpaid Balance; however, such prepayment does not replace any normally scheduled payment unless the Department receives payment in full.
- F) If any payment made by the Borrower is less than the amount required under this Agreement, then such payment shall first be applied to reduce any accrued unpaid interest due on the Loan, and the balance shall be used to reduce the principal of the Loan.

ARTICLE 8 –DEPARTMENT’S REMEDIES ON DEFAULT

Upon the occurrence of Default, the Department may:

- A) Exercise all rights and remedies accorded the Department in the security agreements signed by Borrower including, but not limited to, the right to take possession of the Project Area.
- B) Exercise all rights and remedies accorded to the Department by law, including, but not limited to, those rights established in the Harbors and Navigation Code.
- C) Declare the Loan (including, without limitation, all accrued interest) immediately due and payable without further demand or notice.

ARTICLE 9 - RIGHT OF THE DEPARTMENT TO TAKE POSSESSION OF THE PROJECT AREA

- A) The Department may take possession of the Project Area if the Borrower is in Default. The Department shall, after the exercise of such option, construct, operate or maintain the Project Area for the account of the Borrower until the Loan is repaid in full; the revenues received from the Project Area during such time shall be applied first to reduce the interest and second to reduce the principal of the Loan and then to cover any other expenses incurred in the operation of the Project Area.

ARTICLE 10 - RIGHT OF ENTRY BY THE DEPARTMENT

- A) The Department and its agents may, at any and all reasonable times during the term of this Agreement, enter the Project Area for purposes of inspecting the Project or as otherwise necessary for the Department to exercise its rights under this Agreement.

ARTICLE 11 - LAND CONTROL

- A) The Borrower shall not transfer its interest in the Property Area without the written approval of the Department.

ARTICLE 12 - OPERATION OF PROJECT

- A) The Borrower shall establish berthing rates, subject to the approval of the Department, within the Project Area sufficient to comply with sections 71.4 and 71.8 of the Harbors and Navigation Code. The Borrower shall adjust such rates as necessary; however, such adjustments shall be made no less than once each year and shall not be less than the equivalent percentage change over the preceding 12 months in the United States Bureau of Labor Statistics' Consumer Price Index (CPI) for the United States, or such other index as selected by the Department.
- B) The Borrower shall annually report (due June 1 if Borrower's fiscal year runs January 1 through December 31, or due December 1 if Borrower's fiscal year runs July 1 through June 30) to the Department the following:

- 1) Amounts deposited into the Reserve Fund account,
 - 2) Amounts withdrawn from the Reserve Fund account,
 - 3) Monthly Project Area Gross Revenues,
 - 4) Uses of funds withdrawn from the Reserve Fund account,
 - 5) Brief assessment of the condition of the Project (Marina),
 - 6) Anticipated expenditures from the Reserve Fund account over the next five years,
 - 7) Audited official report on status and activity of the Reserve Fund during the fiscal year, and
 - 8) Audited annual financial statements including the following:
 - (a) Balance Sheet
 - (b) Income Statement
 - (c) Cash Flow Statement
- C) Project Area electrical systems that extend into or over water shall be inspected biennially, by a licensed electrical contractor or electrical engineer for compliance with the safety-related provisions of the California Electrical Code (Part 3 of Title 24 of the California Code of Regulations).
- D) The Borrower shall each year conduct a survey of berthing charges that prevail in the same market area as the Project Area and shall transmit the results of the survey to the Department by April 1 of the following calendar year.
- E) The Borrower shall operate the Project Area as or in conjunction with a small craft harbor.
- F) The Borrower shall:
- 1) Continuously operate in an efficient and economical manner all Project Area facilities acquired, constructed, improved, maintained, or completed, in full or in part, as a result of the Loan,
 - 2) Make all repairs, renewals and replacements necessary so that the Project Area at all times meets the minimum standard of maintenance set forth in the "Department of Boating and Waterways Marina Maintenance Standards and Guidelines" which the Department shall provide and shall become a part of this Agreement as Exhibit C,
 - 3) Operate, maintain and control the Project with its own employees; however, the Borrower may lease portions of the Project Area, provided that such leases are awarded in accordance with Harbors and Navigation Code sections 72 or 72.2, and provided that such leases do not include any berthing systems or any other revenue producing items paid for by the Loan,

- 4) Make all Project Area facilities available to all on equal and reasonable terms,
 - 5) Make all Borrower's books, papers, records and accounts relative to the Project Area open and available for inspection and audit by the Department or any authorized representative of the Department during normal business hours, and
 - 6) Periodically fix, prescribe, and collect fees, rentals, or other charges for services and use of facilities within the Project Area sufficient to produce gross income adequate for payment of the following in the order set forth:
 - (a) All installments of principal and interest on the Loan, and
 - (b) All expenses of operation, maintenance, and repair of facilities in the Project Area.
- G) The Borrower shall establish a Reserve Fund and shall deposit monthly an amount equal to Two Percent (2%) of Project Area Gross Revenues into the Reserve Fund.
- 1) Borrower shall set up an individual account in its Treasurer's Office, which account shall be the Reserve Fund depository.
 - 2) The Borrower shall use deposited funds for extraordinary, non-routine maintenance, repair and/or dredging of the Project throughout the term of this Agreement.
 - 3) Borrower's use of the Reserve Fund shall be consistent with "Department of Boating and Waterways Marina Maintenance Standards and Guidelines."
 - 4) Borrower shall provide proof that it has established and is contributing monthly to the Reserve Fund account before any Loan funds will be disbursed.
 - 5) All expenditures from the Reserve Fund shall require prior written approval of the Department. Written approval may include, but not be limited to, e-mail approval. Invoices or other evidence of expenditures must accompany a request for Department approval.
 - 6) Any interest accrued in the Reserve Fund shall be retained in the Reserve Fund.
 - 7) Any funds remaining in the Reserve Fund upon termination of this Agreement shall be returned to the Borrower: however, Borrower shall not be eligible for future Department funding unless and until an amount equal to the remaining funds is first expended toward the Project.

ARTICLE 13 - LIABILITY AND FIRE INSURANCE

- A) The Borrower shall insure the Project through one of the following alternatives:

ALTERNATIVE I

- 1) The Borrower shall maintain in full force and effect during the term of this Agreement the following insurance in the minimum amounts specified:

Bodily Injury or Death:	\$300,000 each person \$1,000,000 each occurrence
Property and Product Damage	\$500,000 each occurrence \$1,000,000 aggregate
Fire Insurance	90% of the full insurable value of all insurable components of the Project.

ALTERNATIVE II

- 1) The Borrower agrees that all contracts between it and the designer (or designers) responsible for design and preparation of plans and specifications of the Project shall contain a clause requiring said designer(s) to obtain Architect's Professional Liability (errors and omissions) Insurance in the amount of \$250,000.
- 2) The Borrower agrees that all contracts between it and the contractor (or contractors) responsible for construction of the Project shall contain a clause which requires the contractor(s) to obtain insurance in the minimum amounts specified in Alternative I.
- 3) The Borrower prior to acceptance and operation of the Project shall procure and maintain in full force and effect during the remainder of the term of this Agreement insurance in the amounts specified in Alternative I.

ALTERNATIVE III

- 1) The insurance requirements specified in the preceding Alternative I may be satisfied to the extent that the Borrower can provide comparable protection for the Borrower and the Department by virtue of the Borrower's participation in any "risk management" plan, self insurance program, insurance pooling arrangement, or any combination of these, provided that the protection plan has been reviewed by the Department.
- B) Copies of any policy or policies, including any new or renewal policy, shall be in a form satisfactory to the Department. Copies of such policy or policies shall be submitted to the Department at least Twenty (20) days prior to the effective date or dates thereof.
- C) Under Alternative I above, any policy or policies shall contain the following endorsement:
The State of California, its officers, employees and agents are hereby declared to be additional insureds under the terms of this policy, as to activities of both the Borrower and the Department in respect to the Project, and this policy shall not be cancelled without Thirty (30) days prior written notice to the Department.
- D) Loss under any fire insurance policy shall be payable to the Department for deposit in an appropriate trust fund with the State of California. The proceeds may be paid to the

Borrower upon the Borrower's application for the reconstruction of the destroyed facilities.

- E) The Department shall not be responsible for the payment of any premiums or assessments on Borrower's insurance policies.

ARTICLE 14 - INSTALLATION OF OTHER FACILITIES

- A) The Borrower may at its own expense place or cause to be placed within the Project Area any structure, alteration, and/or improvement in addition to those set forth and described in Exhibit B, provided that such facilities:
 - 1) Are constructed, maintained and operated for the use, enjoyment protection and service of the public,
 - 2) Do not directly or indirectly reduce the service capabilities for the boating public called for in Exhibit B including the sanitary and parking facilities, and
 - 3) Have the prior written approval of the Department. Approval shall not be unreasonably withheld.
- B) The Department shall not be obligated to make or cause to be made any alteration, improvement, or repair to any facilities within the Project Area in addition to the original construction to the Project as provided for herein.

ARTICLE 15 - SIGN REFERRING TO DEPARTMENT FINANCING

The Borrower shall cause a permanent sign to be installed within the Project Area, which shall include a statement that the Department financed the Project. The sign may contain additional statements that recognize the participation of other government agencies in the Project. The sign shall be installed before the Project is made available to the public. The location and make-up of the sign, including the dimensions, materials and lettering, require the prior approval of the Department.

ARTICLE 16 - DIRECTIONAL SIGNS

The Borrower shall at the direction of the Department cause permanent directional signs to be installed that shall provide adequate directions for reaching the Project Area. The signs shall be installed on major roads in the area and in as close proximity as possible to freeway exits in conformance with the provisions of the City's Development Code and CalTrans policy. The locations and make-up of the signs, including the dimensions, materials, and lettering, require the prior approval of the Department.

ARTICLE 17 - WAIVER OF RIGHTS

It is the intention of the parties to this Agreement that from time to time either party may waive, in writing, certain rights under this Agreement. Any waiver by either party hereto of its rights with respect to a Default or any other matter arising in connection with this Agreement shall not be deemed to be a waiver with respect to any other Default or matter.

ARTICLE 18 – NOTICES

The parties agree that to avoid unreasonable delay in the progress of the services performed hereunder; the Borrower and the Department shall each designate specific staff representatives for the purposes of communication between parties. Any notice or other written communication required or which may be given hereunder shall be deemed given when delivered personally, or if mailed, Three (3) days after the date of mailing; unless by express mail, facsimile (FAX) telecopy, e-mail, or telegraph, then upon the date of confirmed receipt to the following representatives:

For the Department:

Department of Boating and Waterways
Attention: *NAME*, Contract Administrator
2000 Evergreen Street, Suite 100
Sacramento, CA 95815
Telephone Number: (916) *NUMBER*
FAX Number: (916) 263-0648

For the Borrower:

BORROWER
Attention: *NAME, TITLE*
ADDRESS
Telephone Number:
FAX Number:

Either party hereto may, from time to time by notice in writing served upon the other as aforesaid, designate a different mailing address or a different or additional person to which all such notices or demands thereafter are to be addressed.

ARTICLE 19 - REMEDIES NOT EXCLUSIVE

The use by either the Department or the Borrower of any remedy specified in this Agreement for the enforcement of this Agreement is not exclusive and shall not deprive the party using such remedy of, or limit the application of, any other remedy provided by law.

ARTICLE 20 - OPINIONS AND DETERMINATIONS

Where the terms of this Agreement provide for action to be based upon the opinion, judgment, approval, review, or determination of either the Department or Borrower, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious or unreasonable.

ARTICLE 21 - SUCCESSORS AND ASSIGNS OBLIGATED

This Agreement and all of its provisions shall apply to and bind the successors and assigns of the parties hereto.

ARTICLE 22 - ASSIGNMENT

No assignment or transfer of this Agreement or any part hereof, rights hereunder, or interest herein by the Borrower shall be valid unless and until it is approved by the Department in writing. The Department's approval shall be granted at its sole discretion and may be made subject to such reasonable terms and conditions as the Department may impose.

ARTICLE 23 - LIABILITY

- A) The Borrower waives all claims and recourse against the Department including the right to contribution for any loss or damage arising from, growing out of, or any way connected with or incident to this Agreement.
- B) The Borrower agrees to indemnify, defend and save harmless, the Department, its officers, agents and employees from any and all claims and losses accruing or resulting to any and all contractors, subcontractors, suppliers, laborers, and any other person, firm or corporation furnishing or supplying work services, materials, or supplies in connection with the performance of this Agreement, and from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by Borrower in the performance of this Agreement.
- C) If the Department is named as a co-defendant pursuant to Government Code section 895, et seq., the Borrower shall notify the Department and represent it unless the Department elects to represent itself. If the Department undertakes its own defense, it shall bear its own litigation costs, expenses and attorney's fees.

ARTICLE 24 - PRIOR TERMINATION

This Agreement shall terminate on the date specified in Article 6 (A) of this Agreement if by such date (1) the Borrower has not met all conditions precedent to disbursement under this Agreement, or (2) the Department has disbursed no part of the Loan funds.

ARTICLE 25 – APPROVAL

This Agreement is of no force or effect until signed by both parties and approved by the Department of General Services. Borrower may not commence performance until such approval has been obtained.

ARTICLE 26 - AUDIT

Any contracts entered into by the Borrower involving an expenditure of Loan funds shall contain a provision that the Department, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records for possible audit for a minimum of Three (3) years after final payment under such contract, unless a longer period of records retention is stipulated. Borrower agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. (Government Code section 8546.7, Public Contract Code section 10115 et seq., Title 2, California Administrative Code, section 1896).

ARTICLE 27 – RECYCLING CERTIFICATION

Upon the completion of performance under this Agreement, the Borrower shall certify in writing under penalty of perjury, the minimum, if not exact, percentage of recycled content, both post consumer material and secondary material as defined in the Public Contract Code sections 12161 and 12200, in materials, goods, or supplies offered or products used in the performance of this Agreement, regardless of whether the product meets the required recycled product percentage as defined in the Public Contract Code sections 12161 and 12200. Borrower may certify that the product contains zero recycled content. (Public Contract Code sections 10233, 10308.5, 10354)

ARTICLE 28 – CERTIFICATION CLAUSES

The *CONTRACTOR CERTIFICATION CLAUSES* found at the following address:

<http://www.documents.dgs.ca.gov/ols/ccc-103.doc>, as of the effective date of this Agreement, are hereby incorporated by reference and made a part of this Agreement.

ARTICLE 29– ANTITRUST CLAIMS

The Borrower by signing this Agreement hereby certifies that if services or goods are obtained by means of competitive bid, the Borrower shall comply with the requirements of the following:

- A) The Government Code Chapter on Antitrust claims contains the following definitions:

- 1) "Public purchase" means a purchase by means of competitive bids of goods, services, or materials by the State or any of its political subdivisions or public agencies on whose behalf the Attorney General may bring an action pursuant to the Business and Professions Code subdivision (c) of section 16750.
 - 2) "Public purchasing body" means the State or the subdivision or agency making a public purchase. Government Code section 4550.
- B) In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, it will assign to the purchasing body all rights, title, and interest in and to all causes of action it may have under the Clayton Act section 4 (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid. Such assignment shall be made and become effective at the time the purchasing body tenders final payment to the bidder. Government Code section 4552.
- C) If an awarding body or public purchasing body receives, either through judgment or settlement, a monetary recovery for a cause of action assigned under this chapter, the assignor shall be entitled to receive reimbursement for actual legal costs incurred and may, upon demand, recover from the public body any portion of the recovery, including treble damages, attributable to overcharges that were paid by the assignor but were not paid by the public body as part of the bid price, less the expenses incurred in obtaining that portion of the recovery. Government Code section 4553.
- D) Upon demand in writing by the assignor, the assignee shall, within one year from such demand, reassign the cause of action assigned under this part if the assignor has been or may have been injured by the violation of law for which the cause of action arose and (a) the assignee has not been injured thereby, or (b) the assignee declines to file a court action for the cause of action. See Government Code section 4554.

ARTICLE 30 - CHILD SUPPORT COMPLIANCE ACT

- A) Borrower recognizes the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with section 5200) of Part 5 of Division 9 of the Family Code.

- B) Borrower, to the best of its knowledge is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the California Employment Development Department.

ARTICLE 31 - UNENFORCEABLE PROVISION

In the event that any provision of this Agreement is unenforceable or held to be unenforceable, then the parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby.

ARTICLE 32- UNION ORGANIZING

For all contracts, except fixed price contracts of \$50,000 or less, the Borrower acknowledges that:

- A) Borrower will not assist, promote or deter union organizing by employees performing work on a state service contract, including a public works contract.
- B) No state funds received under this Agreement will be used to assist, promote or deter union organizing.
- C) Borrower will not, for any business conducted under this Agreement, use any state property to hold meetings with employees or supervisors, if the purpose of such meetings is to assist, promote or deter union organizing, unless the state property is equally available to the general public for holding meetings.
- D) If Borrower incurs costs, or makes expenditures to assist, promote or deter union organizing, Borrower will maintain records sufficient to show that no reimbursement from state funds has been sought for these costs, and that Borrower shall provide those records to the Attorney General upon request.

Borrower, by signing this Agreement, acknowledges the applicability of Government Code section 16645 through section 16649 to this Agreement.